No. 94-329

Supreme Court, U.S.
FILED
JAN 13 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

RONALD W. ROSENBERGER, *et al.*,

Petitioners,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., AMERICAN JEWISH CONGRESS, UNION OF AMERICAN HEBREW CONGREGATIONS, HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC., PEOPLE FOR THE AMERICAN WAY, AND NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a substantial grant of governmental funds to a religious student organization to pay for an indisputably religious publication would violate the Establishment Clause and the principle of governmental neutrality contained therein.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

INTEREST OF AMICI CURIAE vii

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE HISTORIC PRACTICE OF DENYING STATE FUNDS TO SUPPORT RELIGIOUS SPEECH AND ACTIVITIES PROTECTS RELIGION FROM THE HARMFUL EFFECTS OF GOVERNMENTAL INVOLVEMENT 3

II. THIS COURT'S ESTABLISHMENT CLAUSE CASES ARE CONTRARY TO PETITIONERS' CLAIM FOR STATE FUNDS TO FINANCE THEIR RELIGIOUS SPEECH AND ACTIVITIES 9

III. THE CONSTITUTION GUARANTEES EQUAL ACCESS FOR STUDENT RELIGIOUS SPEECH, NOT EQUAL ADVANCEMENT 18

CONCLUSION 22

APPENDIX A . . . . . A - 1

TABLE OF AUTHORITIES

CASES

Board of Educ. v. Allen, 392 U.S. 236 (1968) 16

Board of Educ. v. Grumet, ___ U.S. ____, 114 S. Ct. 2481 (1994) 9-11

Board of Educ. v. Mergens, 496 U.S. 226 (1990) . 11, 18, 19

Bowen v. Kendrick, 487 U.S. 589 (1988) 13, 16, 17

Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 10, 11, 13

Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) 12, 19, 21

County of Allegheny v. ACLU 492 U.S. 573, (1989) 9

Employment Div. v. Smith, 494 U.S. 872 (1990) 13

Everson v. Board of Educ., 330 U.S. 1 (1947) 16

Hunt v. McNair, 413 U.S. 734 (1973) 13, 14, 17

Lamb's Chapel v. Center Moriches Union Free School Dist., ___ U.S. ___, 113 S. Ct. 2141 (1993) 9, 18

Lee v. Weisman, ____ U.S. ____, 112 S. Ct. 2649 (1992) 11

Lemon v. Kurtzman, 403 U.S. 602 (1971) 9-11, 19

Lynch v. Donnelly, 465 U.S. 668 (1984) 9

Meek v. Pittenger, 421 U.S. 349 (1975) 13

Mueller v. Allen, 463 U.S. 388 (1983) 20

Planned Parenthood v. Casey, ___ U.S. ___, 112 S. Ct. 2791 (1992) 18

Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) 14, 17

Rosenberger v. The Rector and Visitors of the Univ. of Virginia, 18 F.3d 269 (4th Cir. 1994) 4, 18

School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963) 10

Tilton v. Richardson, 403 U.S. 672 (1971) 14

Walz v. Tax Comm'n, 397 U.S. 664 (1970) 20

Widmar v. Vincent, 454 U.S. 263 (1981) 18

Wisconsin v. Yoder, 406 U.S. 205 (1972) 11

Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986) 15

Zobrest v. Catalina Foothills School Dist., ____ U.S. ____, 113 S. Ct. 2462 (1993) 16

STATUTES

20 U.S.C. §§ 4071 - 72 11

42 U.S.C. § 2000e-1 12

42 U.S.C. § 2000bb 12

42 U.S.C. § 9585 - 9858q 11-12

42 U.S.C. § 12584(a)(4)(E) 15

OTHER AUTHORITIES

Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986) 3

William R. Estep, *Revolution Within the Revolution* (1990) 5

Edwin S. Gaustad, *A Disestablished Society: Origins of the First Amendment*, Vol. XI A Journal of Church and State 409 6

Edwin S. Gaustad, *Liberty of Conscience: Roger Williams in America* (1991) 6

A. E. Dick Howard, *The Supreme Court and the Serpentine Wall, in The Virginia Statute for Religious Freedom* (1988) 13

Thomas Jefferson, *A Bill for Establishing Religious Freedom, reprinted in* Miller and Flowers, *Toward Benevolent Neutrality: Church, State and the Supreme Court* (1992) 4, 6

Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875 (1986) 5, 7

Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990) 10

James Madison, *Memorial and Remonstrance Against Religious Assessments, reprinted in* Appendix to *Everson v. Board of Educ.*, 330 U.S. 1, 63 (1947) 3, 4, 7

Michael McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 Geo. Wash. L. Rev. 685 (1992) 12

William Lee Miller, *The First Liberty Religion and the American Republic* (1988) (1985) 7

INTEREST OF AMICI CURIAE

Amici joining this brief represent a broad segment of the religious, educational and civil liberties communities. We strongly support freedom of speech and press and the free exercise of religion. We likewise support the right of "equal access" of students in the public schools and in colleges and universities. We also have argued for the right of churches to evening and weekend use of school facilities on an equal footing with other community groups. However, we are adamant in our opposition to attempts to obtain state funds to pay for the exercise of those rights. "Equal access" does not carry with it the right to "equal advancement" under this Court's Establishment Clause jurisprudence. Hence, we file on behalf of Respondents in this case, not because we oppose student religious speech, but because the First Amendment rightly forbids the state to pay for it.

In this brief, *amici* focus exclusively on the Establishment Clause issues -- leaving the task of briefing other issues in this case to the parties and other *amici*.

A Statement of Interest of each amicus is attached as Appendix A.

SUMMARY OF ARGUMENT

Religion is different. The framers said so by including two religion clauses in the First Amendment. The Establishment Clause and the Free Exercise Clause, taken together, require government to be neutral toward religion -- neither advancing nor inhibiting it, but setting it free to flourish or founder on its own.

The conviction that government should be neutral in matters of faith originated not with James Madison and Thomas Jefferson, or even with John Locke, but with a fundamentalist preacher, Roger Williams. Williams, who founded Rhode Island as a haven for conscience, spoke of the need for a "hedge or wall of separation between the garden of the church and the wilderness of the world." For Williams, governmental neutrality toward religion was essential to the maintenance of a robust church and a healthy government. Colonial Baptists and other dissenting faiths, particularly in Virginia, carried Williams' vision forward and provided most of the grassroots support for disestablishment and eventually for the religion clauses in the First Amendment.

Religion must be treated differently. The Free Exercise Clause, at times, requires that religion be granted special accommodation. Conversely, the Establishment Clause sometimes imposes special limitations. One is the stern prohibition against the use of public funds to advance religious doctrine. Although the government may subsidize private speech and activities, it may not subsidize religion. This principle is grounded in the sound public policy that religion should be voluntary and that religion fares best when freed from governmental assistance and control.

This Court has long recognized the wisdom of the model advanced by Madison, Jefferson and Colonial preachers and incorporated by them into the Bill of Rights. The Court

repeatedly has affirmed the principle that public funds should not be used to advance or to inhibit religion. Only when government funds are provided to individuals who then choose on their own to use them for religious purposes has the Court recognized exceptions to the no-funding rule. In no instance has the Court been willing to permit -- much less require -- a state to provide a direct cash subsidy to an unabashedly religious organization for an admittedly religious purpose.

What Petitioners seek is not "equal access" but "equal advancement." Providing equal access is not only permitted by the Establishment Clause, it is often required by the Free Speech Clause. But subsidizing a religious message amounts to an impermissible advancement of religion -- even when equally available to non-religious recipients.

When the government pays the bills, it is no longer granting access, it is actually advancing the religious message. It is no longer removing a governmentally-imposed burden on religious speech; it is directly supporting the religious communication itself. It is no longer getting out of religion's way; it is getting behind to push.

A substantial grant of governmental funds to a sectarian organization to finance the publication of a religious message is contrary to the principle of governmental neutrality and violates the Establishment Clause.

ARGUMENT

I. THE HISTORIC PRACTICE OF DENYING STATE FUNDS TO SUPPORT RELIGIOUS SPEECH AND ACTIVITIES PROTECTS RELIGION FROM THE HARMFUL EFFECTS OF GOVERNMENTAL INVOLVEMENT

The fact that this case arises from Virginia, the cradle of religious liberty, infuses the proceedings with the dramatic irony that might be found in a novel. Virginia is the stage where Colonial free-church Christians challenged the established church on the grounds that it was morally wrong to tax citizens to promote particular religious opinions.[1] Virginia is the backdrop for James Madison's *Memorial and Remonstrance Against Religious Assessments*, a powerful missive that successfully scuttled Patrick Henry's attempt to tax citizens to pay for the teaching of Christianity.[2] Virginia is the venue of the university founded by Mr. Jefferson himself -- the fiercest advocate of the separation of church and state of all the founders.

These Colonial forebears would be horrified to see the constitutional mischief Petitioners -- however well-intentioned -- seek to accomplish by asking government to pay for their religious speech and activities. Mr. Jefferson would say "no." He would tell us that, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves

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[1]*See generally* Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 134-48 (Oxford University Press 1986).

[2]James Madison, *Memorial and Remonstrance Against Religious Assessments*, *reprinted in* Appendix to *Everson v. Board of Educ.*, 330 U.S. 1, 63 (1947).

and abhors, is sinful and tyrannical."[3] He further would remind us, as did the Fourth Circuit, that while "schools" of religion were to be granted access and allowed "on the confines of the University," the University did not thereby commit itself to build their schools for them.[4]

Mr. Madison also would oppose state-funded religion -- whether through Patrick Henry's General Assessment Bill or through the expenditure of student activities funds to publish a religious periodical. In his *Memorial and Remonstrance*, Madison warned that not even "three pence" of one's property should be used "for the support of any one establishment," because the same authority may require the citizen to support another with which he disagrees.[5] Madison was convinced that such an assessment "is not requisite for the support of the Christian religion," but contrary to it since "every page of it disavows a dependence on the powers of this world."[6] Instead, those who would propagate religion should turn to "voluntary rewards of their flocks."[7]

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[3]Thomas Jefferson, *A Bill for Establishing Religious Freedom, reprinted in* Robert T. Miller and Ronald B. Flowers, *Toward Benevolent Neutrality: Church, State and the Supreme Court* Appendix. A. (4th ed., Markham Press Fund of Baylor University Press 1992).

[4]*Rosenberger v. The Rector and Visitors of the Univ. of Virginia*, 18 F.3d 269, 284 (4th Cir. 1994) (citing 19 *The Writings of Thomas Jefferson* 408 (A. Bergh ed., 1905) (report of the Rector to the University Visitors dated October 7, 1822)).

[5]Madison, *Memorial and Remonstrance, reprinted in* Appendix to *Everson*, 330 U.S. at 65-66.

[6]*Id.* at 67.

[7]*Id.* at 68.

Not to be outdone by the Anglican Madison, Virginia Baptists organized a General Committee to trumpet a similar note in opposition to the General Assessment Bill:

> [I]t is believed to be repugnant to the spirit of the gospel for the legislature thus to proceed in matters of religion; that the holy author of our religion needs no such compulsive measures for the promotion of his cause; that the gospel wants not the feeble arm of man for its support; that it has made and will again through divine power make its way against all opposition; and that *should the legislature assume the right of taxing people for support of the gospel it will be destructive to religious liberty.*[8]

In short, as Professor Douglas Laycock, counsel for some of Petitioners' *amici*, has observed: "[The Framers] rejected all taxes [to support religion] . . . . The principle was what mattered. With respect to money, religion was to be wholly voluntary. Churches either would support themselves or they would not, but the government would neither help nor interfere."[9]

Amici, like the founders, do not oppose governmental promotion of religious speech and activities because we wish religion ill. To the contrary, we want to protect religion from the harm that occurs when the gears of church and state are allowed to mesh. At least from the time that Constantine made Christianity the official religion of the Roman Empire, when church and state have come together, the alliance has been an

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[8]This "Formula Petition" is reprinted in William R. Estep, *Revolution Within the Revolution* 193 (William B. Eerdmans Publishing Company 1990) (emphasis added).

[9]Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 923 (1986).

"unholy" one. It is an axiom of church-state relations that the secular dilutes the sacred when the two are put under common control. Roger Williams, who founded Rhode Island as a haven for conscience after his banishment from Massachusetts Bay, understood this reality existentially. He called for a "hedge or wall of separation between the garden of the church and the wilderness of the world."[10]

It matters not that the state's motives are ostensibly pure. As the Colonial Virginia Baptist preacher, John Leland, once exclaimed, "Experience . . . has informed us, that the fondness of magistrates to foster Christianity, has done it more harm than all the persecutions ever did."[11] And, Jefferson, in his Bill for Establishing Religious Freedom, noted the futility of government's efforts to aid religion because:

> [I]t tends also to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it; that though indeed these are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way . . . .[12]

Madison also railed against the general assessment to

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[10]Edwin S. Gaustad, *Liberty of Conscience: Roger Williams in America* 207 (William B. Eerdmans Publishing Company 1991).

[11]Edwin S. Gaustad, *A Disestablished Society: Origins of the First Amendment*, Vol. XI A Journal of Church and State 409, 414 (1969) (quoting *The Writings of the Late Elder John Leland* 278 (L.F. Greene, ed., Arno Press 1970) (1845).

[12]Jefferson, *A Bill for Establishing Religious Freedom, reprinted in* Miller and Flowers, *supra*.

promote Christianity because the measure "implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an *unhallowed perversion of the means of salvation.*"[13]

Petitioners are wrong when they claim Madison opposed the General Assessment Bill only because it was to be applied unequally and was "imposed for the *sole* purpose of fostering religion."[14] To the contrary, Madison was unalterably opposed to the assessment in principle.[15] It is true that, in his *Memorial and Remonstrance*, Madison notes that certain religious sects -- "Quakers and Menonists" -- were given exemptions not afforded to other religious groups.[16] But Madison worried about this unequal treatment because he wanted *all* sects exempted. Opponents of the assessment did not want "*any* form of financial aid to churches."[17] Moreover, the assessment did not benefit just religion. Virginia taxpayers were allowed to direct their share to "schools" instead of churches.[18]

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[13]Madison, *Memorial and Remonstrance, reprinted in* Appendix to *Everson*, 330 U.S. at 67 (emphasis added).

[14]Pet. Brief at 37.

[15]*See generally* William Lee Miller, *The First Liberty: Religion and the American Republic* 101-03 (Paragon House Publishers 1988) (1985).

[16]Madison, *Memorial and Remonstrance, reprinted in* Appendix to *Everson*, 330 U.S. at 66.

[17]Laycock, *"Nonpreferential" Aid to Religion, supra*, at 899 (emphasis added).

[18]*Id.* at 897.

By demanding a subsidy from the University's coffers, Petitioners invite a continuing, dependent and harmful alliance with the state. While Petitioners currently regard this as a boon, it is potentially an intrusive burden. What government funds, government may control. Despite Respondents' current hands-off policy with respect to student groups and publications, there is the ever present possibility that the University could assert numerous requirements or controls.

To all this Petitioners may well reply, "We will risk it. Don't go making our choices for us!" But the risk is not theirs alone to take; nor is the choice made for them only. A decision in Petitioners' favor would create a precedent that will affect others and undercut protections for religion from government that the separation of church and state was designed to ensure. The denial of funding may feel "hostile" to Petitioners, but the protections afforded by the no-funding principle will permit them, and all persons of faith and religious entities, to escape the monitoring, direction and control of government agencies.

Our ancestors who fought so passionately for religious liberty are precisely the ones who steadfastly resisted state assistance to help propagate those religious opinions. As a result of their insistence that the state set the church free, religion has thrived, and the state has been relieved of the daunting task of making decisions about religion -- something it does poorly. This is the genius of the American experiment in religious liberty. The separation of church and state has resulted in a vital constitutional democracy envied by the whole world and a robust religious landscape the likes of which history has rarely witnessed.

In sum, it is critically important that government resist the temptation, in Jefferson's words, to "lay bait in [the] way" of those who would accept the bribe of "worldly honours and emoluments." Respondents have successfully done so here. The Fourth Circuit, to its credit, has refused to compel Respondents to do otherwise.

II. THIS COURT'S ESTABLISHMENT CLAUSE CASES ARE CONTRARY TO PETITIONERS' CLAIM FOR STATE FUNDS TO FINANCE THEIR RELIGIOUS SPEECH AND ACTIVITIES

Not only does the weight of historical opinion favor Respondents' position, this Court's Establishment Clause jurisprudence requiring governmental neutrality toward religion also demands affirmance of the Fourth Circuit's decision.

Amici generally endorse the test embodied in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), that has guided the Court's Establishment Clause decisions for over two decades. Though not a perfect formulation, it has worked well to ensure that government neither advances nor inhibits religion nor becomes excessively entangled in religious affairs. Recently, in *Lamb's Chapel v. Center Moriches Union Free School District*, ___ U.S. ___, 113 S. Ct. 2141 (1993), this Court relied on *Lemon* to dispose of the Establishment Clause issue. And, while Justice O'Connor questioned the use of *Lemon* as a "Grand Unified Theory," she nonetheless noted that "abandoning the *Lemon* framework need not mean abandoning some of the insights that the test reflected, nor the insights of the cases that applied it." *Board of Educ. v. Grumet*, ____ U.S. _____, 114 S. Ct. 2481, 2498, 2500 (1994) (O'Connor, J., concurring in part and concurring in the judgment).[19]

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[19]Petitioners argue that applying Justice O'Connor's "endorsement" analysis to this case improves their position. Pet. Brief at 34-36. The endorsement test may be helpful in cases involving symbolic governmental speech, *see, e.g., Lynch v. Donnelly*, 465 U.S. 668 (1984); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), but it no more serves as a "Grand Unified Theory" than does *Lemon*. The endorsement test is particularly

Whether *Lemon* is used by name to decide cases is less important than ensuring the neutrality principle it embodies. While not relying expressly on *Lemon* in other cases, this Court has made clear that the neutrality principle remains its guiding light. Justice Souter, writing for the Court last term in *Board of Education v. Grumet*, observed that "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion." *Id.* at 2487 (quoting *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973)). To shed further light on this principle, Justice Souter referenced "the wholesome 'neutrality'" described in *Lemon*'s doctrinal ancestor -- *School District of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963). *Id.* at 2488. The Court in *Schempp* stated:

> The wholesome "neutrality" [toward religion] of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. 374 U.S. at 222.

This Court's historic understanding of neutrality does not mean that religion must always be treated the same as secular pursuits. To the contrary, it often requires that religion be treated differently.[20] A "formal" or strict view of neutrality, in contrast, levels the Establishment Clause and deprives it of any

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ill-suited to cases such as this where the government is asked to fund and therefore to directly advance religion.

[20]*See generally* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990).

real meaning. Indeed, this Court in *Grumet*, observed that "[o]ur cases leave no doubt that in commanding neutrality the religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." *Grumet*, 114 S. Ct. at 2492. And, in his concurring opinion in *Lee v. Weisman*, ____ U.S. ____, 112 S. Ct. 2649 (1992), Justice Souter aptly stated that the government's mandate to "remain neutral in matters of religion does not foreclose it from ever taking religion into account." *Id.* at 2676.

"Taking religion into account," or true substantive neutrality, is reflected in the Court's religion clause cases -- some of which accord special accommodation to religion and some of which impose special limitations. *Wisconsin v. Yoder*, 406 U.S. 205 (1972), illustrates an instance in which the Constitution requires that religion be granted special consideration. Conversely, decisions such as *Lemon*, and *Committee for Public Education & Religious Liberty v. Nyquist*, illustrate instances in which the Establishment Clause imposes special limits on the government's relationship to religious speech and activities.

Congress also has felt constrained at times to impose special limits on religious speech and activities to maintain a posture of governmental neutrality. In drafting the Equal Access Act, certain restrictions were placed on religious clubs that were not imposed on other non-curriculum related student clubs. 20 U.S.C. §§ 4071 - 72 (1988). For example, a teacher or sponsor may actively participate in, and even lead, most student clubs. But with respect to religious clubs, teachers serve as classroom monitors and may be present only in a "nonparticipatory capacity." 20 U.S.C. § 4071(c)(3).[21] Along the same lines, in passing the Child Care and Development Block Grant Act 42

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[21]The Equal Access Act is constitutional. *Board of Educ. v. Mergens*, 496 U.S. 226 (1990).

U.S.C. §§ 9858 - 9858q (Supp. V 1993), Congress imposed unique strictures on religious organizations that accept child care block grant funds. Recipients are prevented from using the aid for "any sectarian purpose or activity" or from discriminating on the basis of religion. *Id.* §§9858k(a) and 9858l(a).

In terms of the Free Exercise Clause, Congress has seen fit to "take religion into account." It has given churches and religious organizations a partial exemption from Title VII of the Civil Rights Act, allowing them to discriminate on the basis of religion. 42 U.S.C. § 2000e-1 (Supp. V 1993). Congress recognized that, while secular employers may be prohibited from discriminating on the basis of religion, such a prohibition would be inimical to the mission of churches, synagogues and other religious institutions.[22] How, for example, could a Catholic university advance its own purpose and mission if it were forced to employ non-Catholics in its school of theology? Finally, this substantive understanding of neutrality informed the Congress' passage of the Religious Freedom Restoration Act, requiring the government to demonstrate a compelling interest before it would be allowed to substantially burden someone's exercise of religion. 42 U.S.C. § 2000bb (Supp. V 1993).

Substantive neutrality requires that religion be treated differently under both clauses. Indeed, Professor McConnell himself emphatically agrees: "My position is that the government must 'single out' religion in *both* free exercise and establishment contexts, with the goal of approximating a substantive neutrality in a religiously pluralistic culture."[23] In

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[22]This difference in treatment was unanimously upheld against an Establishment Clause challenge in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

[23]Michael McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 719 (1992).

some cases this may seem to advantage religion when free exercise exemptions are granted, and sometimes it may appear to disadvantage religion when "benefits" are denied under the Establishment Clause. But, in fact, it always serves to keep government in a neutral position *vis-a-vis* religion.

Petitioners and their *amici* want the benefits of the Free Exercise Clause, but not the limits of the Establishment Clause. Most of Petitioners' *amici* have criticized the formal neutrality espoused by this Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), and supported passage of the Religious Freedom Restoration Act. But they are quite willing to embrace a formal concept of neutrality when it suits them under the Establishment Clause.

For purposes of maintaining substantive neutrality and ensuring a robust application of the Establishment Clause, the Court has long held that religion is not entitled to governmental subsidies even though its secular counterparts receive them. *E.g.*, *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Nyquist*, 413 U.S. 756. As Professor A. E. Dick Howard has observed, cases dealing with the use of public funds to advance a religious perspective raise "core establishment concerns."[24] Justice O'Connor has flatly concluded that "*any* use of public funds to promote religious doctrines violates the Establishment Clause." *Bowen v. Kendrick*, 487 U.S. at 623 (O'Connor, J., concurring).

This Court's cases dealing with aid to colleges and universities are particularly instructive. In *Hunt v. McNair*, 413 U.S. 734 (1973), the Court upheld the issuance of revenue bonds for projects at a religiously affiliated Baptist college and set forth

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[24]A. E. Dick Howard, *The Supreme Court and the Serpentine Wall, in The Virginia Statute for Religious Freedom* 337 (Merrill D. Peterson & Robert C. Vaughn eds., Cambridge University Press 1988).

the general rule:

> [Government] aid normally may be thought to have a primary effect of advancing religion [and therefore be unconstitutional] when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission *or when it funds a specifically religious activity in an otherwise substantially secular setting*. *Id.* at 743 (emphasis added).

Thus, either the pervasively sectarian nature of the institution or the religious character of the funded activity disqualifies the college from receiving aid. This Court upheld the grant in *Hunt*, but only because the college was non-sectarian and the funds were not to be used for a religious purpose. *Accord Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (aid in the form of non-categorical grants upheld because the college was not pervasively sectarian and there were strictures against religious use of the money); *Tilton v. Richardson*, 403 U.S. 672 (1971) (federal grants for construction of academic facilities approved, but only to the extent that the funds could not be used for sectarian facilities or the advancement of religion).

Petitioners urge this Court to take a position directly contrary to the teachings of *Hunt*, *Roemer* and *Tilton*. They seek student activity funds to accomplish precisely what these cases condemn -- the transfer of public funds to a religious organization to finance a sectarian message. In fact, Petitioners are doubly disqualified. Their organization is indisputably sectarian and *Wide Awake* is without a doubt a religious publication.

If Petitioners succeed in their argument that a government agency choosing to subsidize some speech and activities must do the same for religious activities, these precedents -- as well as true governmental neutrality toward religion -- will be undermined. For example, if a high school pays for a faculty

member to sponsor the chess club, it could be argued that the school must do the same for a religious club -- even though prohibited by the Equal Access Act. Similarly, if unrestricted grants are given to some private colleges and universities (such as Stanford or Harvard), they would have to be given to others (like Bob Jones University) who wish to use their grants to promote a particular religion. Finally, the numerous provisions in federal law that prohibit proselytizing in subsidized social service programs would be called into question. *E.g.*, National Service Trust Act, 42 U.S.C. § 12584(a)(4)(E)(Supp. V 1993).

This Court's decision in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), also does not support Petitioners. In *Witters*, the Court upheld state financial vocational assistance to a blind student who was attending a Christian college and studying to become a minister. The case did not involve a grant paid directly to a pervasively sectarian college. If it had, the result would have been different. The Court wrote that, "the State may not grant aid to a religious school, whether cash or inkind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State." *Id.* at 487. In her concurring opinion, Justice O'Connor emphasized that the aid was permissible precisely because it was to an individual -- not to a religious institution. *Id.* at 493. The student who received the aid in *Witters* made an independent choice to use the money to defray tuition at a religious college. The benefit conveyed was, first and foremost, to the individual, and any benefit to the religious college was indirect and incidental to the individual choice. *Id.* at 488.

The instant case is not one in which a student receives public funds and chooses to purchase a religious magazine as Mr. Witters chose to purchase his education at the Inland Empire School of the Bible. It involves an attempt to extract from the state a direct cash subsidy to Wide Awake Productions to publish the magazine itself. A comparable situation in *Witters* to that of Petitioners here would have been presented if Mr. Witters had been the president of the Bible college and sought an unrestricted

government grant to promote its religious agenda.

Nor does the Court's decision in *Zobrest v. Catalina Foothills School District*, ____ U.S. ____, 113 S. Ct. 2462 (1993), support Petitioners. In *Zobrest*, this Court held that the Establishment Clause was not violated when the government provided funds under the Individuals with Disabilities in Education Act (IDEA) to pay for a sign-language interpreter to assist a deaf student in attending school. The Court noted, that "[h]andicapped children, not sectarian schools, are the primary beneficiaries of the IDEA; to the extent sectarian schools benefit at all from the IDEA, they are only incidental beneficiaries." *Id.* at 2469.

Giving Mr. Zobrest funds to pay for an interpreter was tantamount to buying him a mechanical hearing aid. He then chose to attend a parochial school where that assistance would be used to facilitate his learning. Thus, *Zobrest* is the quintessential "student benefit" theory case in the line of *Everson v. Board of Education*, 330 U.S. 1 (1947) and *Board of Education v. Allen*, 392 U.S. 236 (1968). If the state of Arizona had provided aid directly to Salpointe Catholic High School for the printing and publishing of a brochure disseminating its religious point of view, then, but only then, would *Zobrest* be analogous to this case. Additionally, the aid in *Zobrest*, according to this Court, did not relieve the school of "an expense that it otherwise would have assumed in educating its students," and "no funds traceable to the government ever [found] their way into sectarian schools' coffers." *Zobrest*, 113 S. Ct. at 2469, 2467-68. Here, it is beyond dispute that the grant would have gone into the coffers of Wide Awake Productions and defrayed the expenses of publishing religious material.

Finally, the Court's decision in *Bowen v. Kendrick*, 487 U.S. 589, is controlling. In *Bowen*, the Court entertained an Establishment Clause challenge to the Adolescent Family Life Act (AFLA) that authorized Federal grants to organizations, including religious ones, to promote sexual abstinence among

teenagers. Although refusing to strike down AFLA on its face, the Court ruled that it would not tolerate such funds going to a pervasively sectarian institution or to promote religious doctrine. The four dissenting justices would have disqualified even religiously affiliated agencies that were not pervasively sectarian from receiving public funds. *Id.* 487 U.S. at 625 (Blackmun, J., dissenting). Justices Kennedy and Scalia would have permitted pervasively sectarian agencies to participate, but only if the money was not "used to further religion." *Id.* at 624 (Kennedy, J., concurring). And, as pointed out above, Justice O'Connor explained that, "*any* use of public funds to promote religious doctrine violates the Establishment Clause." *Id.* at 623 (O'Connor, J., concurring). In short, no member of the *Bowen* Court was willing to permit a direct cash grant to a sectarian entity for a decidedly religious purpose.[25]

Yet that is exactly what Petitioners seek in this case. Wide Awake Productions is unabashedly religious and *Wide Awake* articulates an indisputably religious message. Petitioners cannot prevail in this case without doing irreparable violence to the salutary teaching of *Bowen* and numerous other bright line

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[25]Petitioners attempt to distinguish *Bowen* by claiming that it is only when private organizations receive government funds to act as "conduits for government messages" that "government is under an obligation to ensure that the grantees do not teach or promote religion." Pet. Brief at 28. Petitioners conclude that when the government generally funds a variety of speech activities, the Establishment Clause is not violated if the aid is used to fund religious speech. *Id.* The Court expressed no such distinction in *Bowen*. Indeed, whether the grantee of government funds is a "conduit for a government message" has been inconsequential to the Court's interpretation of the Establishment Clause. *See, e.g., Hunt*, 413 U.S. 734 (revenue bonds); *Roemer*, 426 U.S. 736 (non-categorical grants). The government may not grant funds in a manner that advances religion, regardless of whose message is spoken.

decisions of the Court. As noted by the joint opinion of Justices O'Connor, Kennedy and Souter, in *Planned Parenthood v. Casey*, ___ U.S. ___, 112 S. Ct. 2791, 2808 (1992), "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." The First Amendment will be well-served by adherence to precedent in this case.

III. THE CONSTITUTION GUARANTEES EQUAL ACCESS FOR STUDENT RELIGIOUS SPEECH, NOT EQUAL ADVANCEMENT

Petitioners seek to extricate themselves from the binding effect of settled precedent by couching their argument in terms of "equal access" to speak and publish a religious message. This argument, although facially appealing, mischaracterizes the issues here.

This is not an equal access case. Unlike the high school students in *Board of Education v. Mergens*, 496 U.S. 226, the college students in *Widmar v. Vincent*, 454 U.S. 263 (1981), and the church in *Lamb's Chapel*, 113 S. Ct. 2141, Petitioners have not been denied access to campus facilities. Wide Awake Productions has access to the same facilities and forum as other student groups. Nor has the University sought to muzzle the students' speech or publication. But, as the Fourth Circuit observed, the request for "[d]irect monetary subsidization of religious organizations and projects, however, is a beast of an entirely different color." *Rosenberger*, 18 F.3d at 286.

What Petitioners seek here is not equal access, but equal advancement. Providing equal access for religious speech is not only generally permissible under the Establishment Clause, but often required by the Free Speech Clause. Subsidizing the religious message in such a forum is not. While the Constitution

permits the government to subsidize many types of speech and activity, it may not subsidize religion or forces hostile to religion.[26]

This Court drew the distinction between access and advancement clearly in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327. Justice White, writing for the Court (including Chief Justice Rehnquist and Justices Stevens and Scalia), upheld a legislative exemption for religious organizations under Title VII and observed:

> A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence. *Id.* at 337.

And in *Mergens*, 496 U.S. at 250, Justice O'Connor, in upholding the Equal Access Act, noted the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."

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[26]The University may no more fund anti-religious speech than it may fund religious speech. Thus, if the *Yellow Journal* is actually hostile to religion, it also should be ineligible for state funding. The remedy for an alleged constitutional wrong should not be another constitutional wrong as sought by Petitioners, but rather denial of funding to all activities whose primary effect is to advance or inhibit religion. This would include the Jewish Law Students Association and the Muslim Students Association to the extent that they are engaged in activities that advance religion, even if their message is not highly sectarian or proselytizing.

The difference between access and advancement is paralleled and confirmed by this Court's decisions concerning the constitutionality of tax exemption and deductions. In *Walz v. Tax Commission*, 397 U.S. 664 (1970), the Court upheld a New York real property tax exemption for religious and charitable organizations against an Establishment Clause challenge. While acknowledging tax exemption as an "indirect economic benefit," the Court ruled that the "grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.* at 674, 675. In his concurring opinion, Justice Brennan noted the difference between prohibited general subsidies and permissible tax exemption:

> A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes . . . . Tax exemptions, accordingly, constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy. *Id.* at 690-91 (footnote omitted).

Along those same lines, in *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld state income tax deductions for expenses incurred in sending children to school. Then-Associate Justice Rehnquist, writing for the majority, quickly acknowledged that, "[t]he Establishment Clause of course extends beyond prohibition of a state church or payment of state funds to one or more churches," but concluded that the clause does not "encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue . . . ." *Id.* at 400.

Though the difference between access and advancement is

sometimes hard to trace, as Justice O'Connor recognized in her concurrence in *Amos*, 483 U.S. at 347, it is not hard to pinpoint here. When the government pays the bills, it is no longer granting access, it is actually advancing the religious message. It is no longer removing a governmentally-imposed burden on religious speech; it is directly supporting the religious communication itself. It is no longer getting out of religion's way; it is getting behind to push.

If the Establishment Clause does not forbid these practices, little is left of it.

CONCLUSION

It is wrong -- morally and constitutionally -- to force students at the University of Virginia to support any publication that has a primary effect of advancing or inhibiting religion. The fact that the state is permitted to subsidize other speech and activities does nothing to eliminate the Establishment Clause's wise barrier to cash subsidies for religious speech and activities.

Amici respectfully request this honorable Court to affirm the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

INTEREST OF AMICI CURIAE

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. The Baptist Joint Committee's supporting bodies include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The National Council of Churches of Christ in the U.S.A. is a community of thirty-two Protestant and Eastern Orthodox communions having an aggregate membership in the United States of over forty million. Its positions on public issues are taken on the basis of policies developed by its General Board, composed of some two hundred and fifty members selected by its member communions in proportion to their size and support of the Council. This brief implements the Council's long-standing commitment to religious liberty and its political corollary, the separation of church and state.

The American Jewish Congress (AJCongress) is an organization of American Jews founded in 1918 to protect the

civil, political, economic and religious rights of American Jews. It has taken a particular interest in the Establishment Clause, because in its view the separation of church and state is an indispensable safeguard for the religious liberty of American Jews. AJCongress is equally committed to the Constitutional principle of free expression, nevertheless it does not believe that that principle requires the direct funding of religious speech.

The Union of American Hebrew Congregations (UAHC) represents 1.5 million Reform Jews in 850 congregations nationwide. For over a century, the UAHC has fought for religious liberty and tolerance, believing these to be among the greatest gifts America has bestowed upon the world. The UAHC has staunchly supported reading the Establishment Clause of the First Amendment of the United States Constitution as constructing a wall of separation between church and state and believes this wall has been crucial to the freedom we, as a religious minority, have enjoyed in this country.

Hadassah, the Women's Zionist Organization of America, Inc., has been committed to the principles of religious liberty and the separation of church and state since its inception 81 years ago. Hadassah believes that these constitutional principles are the bedrock of our democratic system. Hadassah has joined prior briefs in support of this position and does so again in the belief that state financing of religious speech and activities undermines these vital constitutional principles.

People For the American Way (People For) is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights, including cases concerning religious liberty, freedom of expression, and

separation of church and state. People For has opposed restrictions on access by religious groups in cases such as *Lamb's Chapel*, where consistent with the Establishment Clause, while vigorously defending church-state separation as vital to religious liberty. People For has joined in filing this *amicus* brief to help vindicate the important First Amendment principles at stake in this case, particularly the principle that government must remain neutral toward religion, which sometimes requires that religion be treated differently from other subjects, and that public funds should not be granted to religious organizations to promote religious expression. This principle is a key aspect of the Constitution's protection of religion and religious liberty.

The National Coalition for Public Education and Religious Liberty (National PEARL) is a national coalition of organizations sharing the objective of preserving religious freedom and maintaining the separation of church and state in public education. Member organizations of National PEARL include educational, religious and civic groups with constituencies in each state.